making this exception.[25] If intent alone be necessary, why does it not suffice to aquire a domicil of choice upon abandonment of the domicil of origin? The authorities are conclusive against this.[26]

A recent Iowa case[27] squarely rejects the distinction, and, it is submitted, properly. Once a domicil is imposed by operation of law or acquired *animo et facto*, that domicil should be retained until a new one is acquired upon the concurrence of the necessary mental and physical elements.[28] Too important consequences flow from domicil to admit of its law being encumbered with artificial exceptions and unnecessary distinctions. When general principles are arbitrarily tampered with, a regretted distinctive local jurisprudence naturally results in a field where uniformity is much desired.

DUE PROCESS AND RETROSPECTIVE LEGISLATION. — Retrospective legislation is not *per se* unconstitutional[1] in the United States. It may, however, be invalid because it runs athwart the due-process clause.[2] To what extent is it due process for a legislature to compel one man to surrender property to another, predicating its action on a past transaction which gave rise to no legal compulsion? Clearly, due process does not allow a legislature by mere fiat unpredicated upon some prior transaction to give B a claim against A.[3] It is suggested[4] that the same objection is valid in two other situations although the legislative fiat is there based upon some prior transaction: first, where the transactions of the parties have created a legal obligation, the remedy for which has been withdrawn by law, as by a statute of limitations; second, where the transactions created no legal obligation because of some irregularity. Such an analysis is sound in pointing out that A holds his property equally free from enforcible claims in the three cases, and so the legislature in substance legislates A's property to B.[5] That

[25] But see JACOBS, DOMICIL, § 191.

[26] See note 8, *supra*.

[27] *In re* Jones' Estate, 182 N. W. 227 (Ia., 1921). For the facts of this case, see RECENT CASES, *infra*, p. 202.

[28] Cooper *v.* Beers, 143 Ill. 25, 33 N. E. 61 (1892). See 33 HARV. L. REV. 863.

[1] League *v.* Texas, 184 U. S. 156 (1901); Luria *v.* United States, 231 U. S. 9 (1913); Drehman *v.* Stifle, 8 Wall. (U. S.) 595 (1869). It was early held that the prohibition as to *ex post facto* laws applied only to criminal matters. Calder *v.* Bull, 3 Dall. (U. S.) 386 (1798). In several states there are constitutional provisions expressly barring retrospective legislation, but the effect of such provisions is outside the scope of the present discussion.

[2] Of course retrospective legislation may also be unconstitutional as impairing the obligation of contracts, or as a usurpation of judicial power.

[3] See Medford *v.* Learned, 16 Mass. 215, 216 (1819).

[4] Danforth *v.* Groton Water Co., 178 Mass. 472, 59 N. E. 1033 (1901).

[5] There are only a limited number of cases on the problem of the constitutionality of retrospective statutes, because in many cases the courts do not reach that question, having regard to the settled rule against construing statutes as retroactive unless there be express language which requires that construction. See COOLEY, CONSTITUTIONAL PROHIBITIONS, 7 ed., 529; ENDLICH, INTERPRETATION OF STATUTES, 362. This rule is qualified by holding that it is not applicable where a statute merely adds a remedy for an existing right and does not affect vested rights. In fact the statute is given a prospective effect entirely, viewing the situation as of the time the remedy is applied. Berkowitz *v.* Arbib, 230 N. Y. 261, 130 N. E. 288.

analysis does not, however, end the problem, for it should be due process to deprive A of his former freedom from claims against his property so long as the legislature does not act arbitrarily. To decide this question, it is necessary to consider the source and nature of the freedom with which A holds his property as illustrated by three typical situations.

First, there are cases where through a prior transaction A has incurred a legal obligation for which a remedy is offered by law, but A's property is free because the remedy is limited. For instance, all of A's property may be protected by statutory exemptions. Clearly, it is not arbitrary, and so is due process of law for a legislature to remove the exemptions although B secures property which A held in absolute freedom before the retrospective enactment.[6]

Second, there are cases where through a prior transaction A has incurred a legal obligation but the remedy for enforcing the obligation has been withdrawn. For instance, a recent New York case [7] holds that a legislature may remove the bar of a statute of limitations on a personal claim though the period has run. Such statutes merely withdraw the remedy offered by local law without affecting the legal obligation which remains enforcible by remedies offered in other jurisdictions.[8] Although before the legislature acted A's property was free under the laws of that jurisdiction,[9] it is not arbitrary to end that freedom by reëstablishing a remedy for the existing obligation.[10]

Third, there are the more difficult cases where no legal obligation has arisen from the prior transaction because of the neglect of some legal formality, or the inclusion of some illegal element. The freedom of A's property is here based upon the fact that he never incurred a legal obligation and so his position is more nearly analogous to that of the person who objects to the creation of a claim against him by legislative fiat unpredicated upon any prior transaction. However, many cases go beyond the first and second situations suggested above where the fiat is based upon a transaction which created an actual legal obligation and hold that it is due process for the legislature to bind the parties to an obligation which a prior transaction would have created but for the

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[6] Myers *v.* Moran, 113 App. Div. 427, 99 N. Y. Supp. 269 (1906); Leak *v.* Gay, 107 N. C. 468, 12 S. E. 312 (1890); Bull *v.* Conroe, 13 Wis. 233 (1860).

[7] Hopkins *v.* Lincoln Trust Co., 187 N. Y. Supp. 883 (1921). For the facts of this case see RECENT CASES, *infra*, p. 202.

[8] Bulger *v.* Roche, 11 Pick. (Mass.) 36 (1831); Williams *v.* Jones, 13 East, 439 (1811); Thompson *v.* Reed, etc., 75 Me. 404 (1883); Home Ins. Co. *v.* Elwell, 111 Mich. 689, 70 N. W. 334 (1897).

[9] Under the decisions in note 8 *supra*, it might be possible for the plaintiff to secure a judgment in a jurisdiction where the remedy is not barred, sue on that judgment in the state where the remedy for the original right is barred, and secure execution on the property in that state.

[10] Campbell *v.* Holt, 115 U. S. 620 (1885); McEldowney *v.* Wyatt, 44 W. Va. 711, 30 S. E. 239; Orman *v.* Van Arsdell, 12 N. M. 344, 78 Pac. 48 (1904). It is often suggested that the weight of authority is against these cases, but there is really very little authority because the courts construe the statutes as having only a prospective effect, or the statutes attempt to remove the bar where title to tangible property has vested by operation of the statute. It may well be held arbitrary for the legislature to upset proprietary titles by moulding a legal obligation out of a moral obligation to return the property. Such a result would be in accord with the reluctance of common-law courts to upset vested property rights.

absence of some technical requirement [11] or the presence of some ingredient against public policy.[12] The courts have thus upheld the legislatures in retrospectively repairing technical mistakes or validating contracts unenforcible because of illegality. A typical instance is found where the legislature validates a contract invalid at the time of negotiation because usurious.[13] Such decisions may be supportable[14] on the ground that it is not arbitrary for the legislature to give B a claim against A when it is predicated upon acts of the parties which almost consummated a legal obligation. It is not unreasonable to take away A's freedom from liability by discarding a legal formality or changing the public policy which prevented the obligation from arising. When the legislature goes beyond validating the substance of an obligation, however, and attempts to predicate one upon a transaction which did not approximate the creation of an obligation, it is not due process.[15] Such an attempt would be as arbitrary as to predicate a claim upon no previous transaction.

POWER OF THE DIRECTORS OF A CORPORATION TO FILE A VOLUNTARY PETITION IN BANKRUPTCY FOR THE CORPORATION. — The Bankruptcy Act of 1898,[1] as amended June 25, 1910, extended to a corporation the right to become a voluntary bankrupt.[2] Although, and indeed because the provisions of the act [3] regarding this matter are apparently unqualified, there has been considerable dispute as to their exact meaning and scope. The law is clear, although it is not expressly so provided in the act, that in the absence of statutory or charter restrictions, the directors of a corporation may file or authorize the filing of a voluntary

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[11] State *v.* Norwood, 12 Md. 195 (1858); Gibson *v.* Hibbard, 13 Mich. 214 (1865); Danforth *v.* Groton Water Co., 178 Mass. 472, 59 N. E. 1033 (1901).

[12] Gross *v.* U. S. Mortgage Co., 108 U. S. 477 (1883); Berry *v.* Clary, 77 Me. 482 (1885); Lewis *v.* McElvain, 16 Ohio 347 (1847); Hewitt *v.* Wilcox, 1 Metc. (Mass.) 154 (1840); Washburn *v.* Franklin, 24 How. Pr. (N. Y.) 515 (1861).

[13] Ewell *v.* Daggs, 108 U. S. 143 (1883); Welch *v.* Wadsworth, 30 Conn. 149 (1861).

[14] Many courts avoid the real issue by applying some set formula, such as: "no vested right to do wrong," Foster *v.* Bank, 16 Mass. 245, 273 (1819); "curing irregularities," Lane *v.* Nelson, 79 Pa. 407 (1875); Randall *v.* Krieger, 23 Wall. (U. S.) 137 (1874); or "a party has no vested right to a defense based upon an informality not affecting his substantial equities," COOLEY, CONSTITUTIONAL PROHIBITIONS, 7 ed., 529. Such formulæ merely state a result and so should not be used to justify a decision. They tend to cover up the fact that in this class of cases A will be compelled to surrender his property by force of legislative enactment and that alone. The problem should receive a direct answer on the ground that the legislature has, or has not, acted arbitrarily and so without or with due process of law.

[15] Medford *v.* Learned, 16 Mass. 215 (1819); Addoms *v.* Marx, 50 N. J. L. 253 (1888); Philip *v.* Heraty, 147 Mich. 473, 111 N. W. 93 (1907).

[1] See 30 U. S. STAT. AT L., § 544.

[2] While the amendment of 1910 first gave to a corporation the right to become a voluntary bankrupt, yet as prior to this time a corporation could admit its insolvency and express its willingness to be adjudged a bankrupt, and get a friendly creditor to file a petition against it, the change in substance wrought by this amendment was not very great. See WILLISTON, CASES ON BANKRUPTCY, 2 ed., 107, note; BRANDENBURG, BANKRUPTCY, 4 ed., § 60.

[3] See § 4a. "Any person except a municipal, railroad, insurance, or banking corporation shall be entitled to the benefits of this act as a voluntary bankrupt."